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IN THE

Supreme Court of the United States

NO. 82-1159

METROPOLITAN ATLANTA
RAPID TRANSIT AUTHORITY,

Petitioner

V.

WILLIAM E. JONES,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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Dated February 17, 1984.

QUESTIONS PRESENTED FOR REVIEW

May an employee maintain an action against his employer for employment discrimination on the basis of handicap under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 5794 when his employer receives federal financial assistance for the purposes of providing employment and when the financial assistance received by the employer are expressly designated for the purposes of providing employment by the funding agency.

LIST OF PARTIES

Names of all parties to the proceeding in the United States Court of Appeal for the 11th Circuit appear in the caption of the case in this Court.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

I. The District Court's granting of summary judgment to the petitioner was a violation of the respondent's right to standing under Section 504 of the rehabilitation act of 1973, as amended, 29 U.S.C. Section 794

A. Respondent has standing under §504 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. §794, according to the Supreme Court's two prong "standing" analysis 6

B. The Respondent has standing under 29 U.S.C. §794 since MARTA was and is the recipient of federal funds 7

1. It is not mandatory under 29 U.S.C. §794 that the Respondent be an "intended beneficiary" of the federal funds given to MARTA 8

2. Even if this Court concludes that 29 U.S.C. §794 required that an aggrieved party be an intended beneficiary of federal funds the Respondent was such an intended beneficiary 9

a. The evidence submitted by MARTA and relied upon by the District Court, addressing itself to MARTA's use of

federal funds, was insufficient and inadequate to sustain the Motion for Summary Judgment granted to Petitioner 9

b. The evidence introduced by MARTA indicates that the Respondent was an intended beneficiary of federal funds 10

II. 49 C.F.R. Sections 27.31 to 27.37 Grants standing to the respondent to bring suit against MARTA for employment discrimination 11

A. The Respondent has standing under 49 C.F.R. §27.31 to 27.37 to bring suit against MARTA for employment discrimination 11

CONCLUSION A-11

APPENDIX 13

TABLE OF AUTHORITIES

Association of Data Processing Services Organization v. Camp, 397 U.S.C. 150 (1950) 1
Poole v. South Plainfield Board of Education, 490 F. Supp. 948 (1980) 3, 5

Statutes

§504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C., §794 ..... iv, vi, vii, ix, x, xi, 1, 2, 3, 4, 5, 10
Title VI of the Civil Rights Act of 1964, §601, 42 U.S.C. §2000d ..... ix, xi, 2, 4, 10
§504(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C., §794(a)(2) ..... ix, 2, 11
Title VI, §604, 42 U.S.C., §2000d-3 ..... 4, 11
49 C.F.R. §27.31(a)(1) 8, 11

NO.

IN THE

Supreme Court of the United States

October Term, 1982

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Petitioner

v.

WILLIAM E. JONES,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETITION FOR A WRIT OF CERTIORARI

Respondent, WILLIAM E. JONES, respectfully prays that a writ of certiorari be denied to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 681 F. 2d 1376 and appears in the Appendix, infra, at p. A01. The judgment of the Court of Appeals appears in the Appendix at p. A-34. The opinion of the United States Court of Appeals for the Eleventh Circuit reversed the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division and remanded the case for further proceedings. The opinion and judgment of the district court is reported at 522 F. Supp. 370 and appears in the Appendix, *infra*, at p. A-36.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit was rendered August 6, 1982. The Metropolitan Atlanta Rapid Transit Authority (hereinafter "MARTA") filed a petition for rehearing and suggestion for rehearing en banc on August 25, 1982. By order entered October 13, 1982, the United States Court of Appeals for the Eleventh Circuit denied MARTA's petition for rehearing and suggestion for rehearing en banc. A copy of said order appears in the Appendix at p. A-32. This Petition for Writ of Certiorari was filed within ninety (90) days from October 13, 1982. The jurisdiction of this Court is involved under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794:

> No otherwise qualified handicapped individual in the United States as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financing assistance or under any program or ac-

tivity conducted by an Executive agency or by the United States Postal Service. The head of each agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act of 1973, as amended 29 U.S.C. §794a:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney's fee as part of the costs.

Section 601 of the Civil Rights Act of 1964, Title VI, 42 U.S.C. §2000d:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of the Civil Rights Act of 1964, Title VI, 42, U.S.C. §2000d-3:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

STATEMENT OF THE CASE

Respondent's Motion for Summary Judgment was granted based upon the district court's conclusion that the limitation of Section 604 of the Civil Rights Act of 1974 denied Respondent standing to bring suit against MARTA for alleged employment discrimination on the basis of his disability. The court found that Sec. 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794, did not confer standing upon the Respondent.

The Respondent William Jones was employed for sixteen years with the Metropolitan Atlanta Rapid Transit Authority (herinafter referred to as MARTA as a bus operator. He was hired in 1960 and worked continually until March 15, 1976, when, while driving a MARTA bus, he was involved in a serious accident. As a result of the accident and injuries suffered by the Respondent, it was necessary for doctors to amputate the Respondent's right leg six inches below the knee. Mr. Jones recovered from his injuries and was fitted with an artificial right leg which he presently wears.

Respondent, following his recovery, returned to his previous employment in the summer of 1977. On September 15, 1977, MARTA rehired William Jones in a capacity of a traffic checker. Respondent earned substantially less than a bus operator at this new position.

Mr. Jones was unsatisfied with his new position, and on August 25, 1978, requested that he be reinstated to his former position as a bus operator. Accordingly, he applied for employment as a bus operator on said date.

On September 25, 1978, MARTA informed the Respondent that he could not be considered for employment as a bus operator by reason of handicap.

William Jones attempted for the next six months to obtain employment with the Petitioner as a bus operator. During that time, he demonstrated to MARTA that the prosthetic device, which enables him to walk, presented no obstacle to his driving a MARTA bus.

Respondent was unsuccessful in his attempts at persuading the Petitioner to hire or reinstate him. Consequently, he retained an attorney, who on March 22, 1979, filed a Complaint for employment discrimination against a handicapped individual under the provisions of Sec. 504 of the Rehabilitation Act of 1973, as amended. For the next year and a half, the Respondent sought to effect his reinstatement by means of administrative remedies but was unsuccessful. On August 5, 1980, in a letter from the Department of Transportation, Office of the Secretary, Civil Rights Division, he was informed that his administrative remedies were exhausted. Ellen Feingold, Director of Civil Rights, informed him that his Complaint had been reviewed with their office. The conclusion reached was that MARTA had violated no provision or policy and that the Respondent's Complaint was resolved and closed in their files. On November 20, 1980, William Jones having exhausted his administrative remedies, filed his present lawsuit.

MARTA filed a Motion for Summary Judgment in the district court contending that the Respondent lacked standing, or alternatively, that if standing existed, he could not claim damages as an appropriate remedy. MARTA also alleged that the applicable statute of limitations had run.

Mr. Jones contended that the filing of the appropriate administrative action tolled the statute of limitations that his employment as both a checker and/or bus operator were federally subsidized operations conferring standing, and that the federal statutes prohibiting discrimination gave rise to a private right of action to correct the efforts of exclusion. Damages were available as an appropriate remedy.

The court, considering MARTA's Motion for Summary Judgment, ruled only on the threshold issue of standing. The court held that the Respondent lacked standing to bring suit against MARTA for alleged employment discrimination. William Jones

then appealed to the court of Appeals for the Eleventh Circuit.

The Court of Appeals held that the district court applied the incorrect standard in determining Respondent's standing to maintain the suit. It was that court's holding that a Plaintiff need only show that the employer received federal financial assistance and that he/she was an intended beneficiary of the assistance. In addition, the Court of Appeals found that the Department of Transportation regulations were written in a manner consistent with the Rehabilitation Act and were therefore valid. Petitioner now seeks this Writ of Certiorari to the Supreme Court of the United States.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT TO THE PETITIONER WAS A VIOLATION OF THE REPONDENT'S RIGHT TO STANDING UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, AS AMENDED, 29 U.S.C. SECTION 794.

A. Respondent has standing under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794, according to the Supreme Court's two prong "standing" analysis.

In *Association of Data Processing Services Organization v. Camp*, 397 U.S.C. 150 (1970), a two-part test was set forth to determine whether an individual had standing to sue under a federal act or statute. The expansive notion of standing adhered to by the Supreme Court required first, that the Plaintiff allege that the challenged action has caused him injury in fact, economic or otherwise, and second, that the interest sought to be protected by the complaintant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.

The statutary quarantee in the instant case concerns the rights and remedies available to the appellant under 29 U.S.C. Sec. 794, Rehabilitation Act of 1973, as amended, (hereinafter referred to as the Rehabilitation Act) when combined with the remedies, procedures, and rights traditionally available to aggrieved parties under Title VI of the Civil Rights Act of 1964, Sec. 601, 42 U.S.C. Sec. 2000d.

In ascertaining the zone of interests regulated by this statute, the court is called upon to review the provisions of the sections cited below:

> "No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..." Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794.

Further, Sec. 504(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 794(a)(2) entitled "Remedies and Attorney Fees", provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

A careful review of these statutes, coupled with the Supreme Court's two-part test, indicates that the Respondent has standing under 29 U.S.C. Sec. 794. In the instant case, it is apparent that the "challenged action" is MARTA's willful failure to reinstate the Respondent to his prior position. MARTA's actions can be only described as an arbitrary discrimination directed against the Respondent on account of his handicap. At a very minimum, Respondent's injuries include the loss of job as a bus operator.

The "zone of interests" protected or regulated by 29 U.S.C. Sec. 794 include the protection of the handicapped from job discrimination. This is apparent from the plain meaning of the statute. The Respondent's arbitrary exclusion from his position of bus operator is cognizable under the Rehabiliation Act according to the Supreme Court's two-prong test.

B. The Respondent has standing under 29 U.S.C. Sec. 794 since MARTA was and is the recipient of federal funds.

While receipt of federal financial assistance by MARTA is necessary in order for the Rehabilitation Act to apply, the district courts are split as to whether a party bringing a private cause of action under the Rehabilitation Act must prove, with regard to the funding received, that they are intended beneficiaries. Respondent submits that he is an intended beneficiary. Respondent

submits that he has standing under either interpretation by the district courts.

1. It is not mandatory under 29 U.S.C. Sec. 794 that the Respondent be an "intended beneficiary" of the federal funds given to MARTA.

An analysis of the effect of federal funds on the receiving institutions' obligation under federal funds is enumerated in *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (1980). The court stated that a recipient of federal funds does not narrow or restrict the class of persons entitled to bring actions under Sec. 405 to those programs specifically designated for funding:

> "I am convinced that in promulgating these regulations, the Secretary of HEW manifested his belief that Sec. 504 of the Rehabilitation Act of 1973 was applicable to entities like the South Plainsfield Board of Education in all of its interscholastic athletic activities if it received federal moneys for any of its programs, athletic or otherwise. It seems absurd to ban discrimination in a distinct area of a school system that receives federal funds, while permitting it throughout the rest of the system. I do not believe that Congress intended to ban discrimination during school hours while permitting it in officially sponsored extracurricular activities."
> 49 F. Supp. at 591.

South Plainfield Board of Education in all of its interscholastic athletic activities if it received federal moneys for any of its programs, athletic or otherwise. It seems absurd to ban discrimination in a distinct area of a school system that receives federal funds, while permitting it throughout the rest of the system. I do not believe that Congress intended to ban discrimination during school hours while permitting it in officially sponsored extracurricular activities."
49 F. Supp. at 591.

Defying logic, MARTA contended in their Motion or Summary Judgment that:

> "to maintain a action for employment discrimination under Sec. 504, a handicapped individual must be an intended beneficiary of the federal financial assistance received by his employer or must be able to show that the discrimination directed against him affected the beneficiaries of such aid. And in suits charging employment discrimination under Title VI, one of the purposes of the federal financial assistance must be to provide employment."
> (MARTA Brief).

To support this, MARTA relies heavily on Title VI, Section 604, 42 U.S.C. Sec. 2000d-3 and the cases discussing said section. However, this reliance is misplaced. This section relates to suits by agencies and departments, and decisions under it are based upon entirely different considerations.

MARTA is the recipient of millions of dollars in federal assistance without which it could not function. Every function of MARTA is inextricably interwoven with the other, rendering the beneficiary or employment test useless to determine the applicability of federal law to discriminate against its employees. The reasoning used by the court in *Poole* makes sense. This court should apply that rule and hold as the Court of Appeals held, that the Respondent has standing.

2. Even if this Court concludes that 29 U.S.C., Sec. 794 requires that an aggrieved party be an intended beneficiary of federal funds, the Respondent was such an intended beneficiary.

Should this court adopt MARTA's interpretation, the Respondent is nonetheless an intended beneficiary and the discrimination against him has affected other beneficiaries. Respondent contends that the federal aid received by MARTA has a direct purpose of providing employment.

a. The evidence submitted by MARTA and relied upon by the district court, addressing itself to MARTA's use of federal funds, was insufficient and inadequate to sustain the Motion for Summary Judgment granted to Petitioner.

MARTA has introduced conflicting evidence showing their use of federal funds. They have introduced a bare affidavit from a MARTA representation stating, "the federal assistance received by the Petitioner is in the form of engineering and construction grants and operating subsidies". (Affidavit, Allen F. Kiepper). MARTA has also submitted 222 pages of contracts from the

Department of Transportation and has admitted that they receive federal assistance which is used for the payment of operator salaries.

Another document in evidence is an Executive Order of the Department of Transportation, issued January 19, 1977, entitled DOT 1000.12. DOT 100.12 addresses itself to whether or not the funds received by a recipient of federal financial assistance from the Department of Transportation are for the purposes of providing employment. In *Chapter III, 2. Types of Covered Employment, (a)(b)*, it is apparent that the Department of Transportation was concerned that the discrimination may occur in programs which receive federal financial assistance.

In the above-cited section, a broad interpretation of the purposes of the Urban Mass Transportation Act is made. In effect, almost every element of the operations of a recipient's Department of Transportation's money is considered for the purposes of providing employment.

b. The evidence introduced by MARTA indicates that the Respondent was an intended beneficiary of federal funds.

MARTA admits it receives government subsidies for operation. (*See also* Urban Mass Transportation Act, 49 U.S.C. Sec. 1601 et seq.) The rules and regulations promulgated under the Act make clear that funds disbursed pursuant to the authority of Sec. 1601 are for the purpose of employment or labor. These relate to operating subsidies. (Exhibit "F", Department of Transportation, Order for Application to Assistance.) The Urban Mass Transit Administration Circular, dated June 10, 1977, and applicable to date, provides for the payment of operating expenses and direct labor payment.

As previously mentioned, DOT 1000.12 discloses that every element of the operations of a recipient of the Department of Transportation's money is considered for the purposes of providing employment. DOT 100.12 demonstrates that since January 19, 1977, the Petitioner knew or should have known that as a recipient of federal financial assistance from the Department of Transportation, Respondent's activities were covered employment activities. Exhibit "G" also outlines that the Respondent's prior position with MARTA was and is directly associated with the funding assistance of the Department of Transportation.

The foregoing demonstrates that the Respondent was a beneficiary under the Act whose purpose was to provide employment with direct payment of labor costs in the form of operating subsidies.

II. 49 C.F.R. SECS. 27.31 TO 27.37 GRANTS STANDING TO THE RESPONDENT TO BRING SUIT AGAINST MARTA FOR EMPLOYMENT DISCRIMINATION.

A. The Respondent has standing under 49 C.F.R. Sec. 27.31 to 27.37 to bring suit against MARTA for employment discrimination.

C.F.R. Sec. 27.31(a)(1) states that no qualified handicapped applicant for employment, or an employee shall, on the basis of handicap, be subjected to discrimination in employment under *any program or activity that receives or benefits from federal financial assistance*. It is apparent that this section confers standing without focusing on whether the aggrieved party was an intended beneficiary of the federal funds.

CONCLUSION

Although Petitioner creates the illusion of a conflict with the decisions of other Circuit Courts on the question presented here, the Court of Appeals for the Eleventh Circuit carefully examined both the language of the relevant statutes and their legislative history, in reaching their holding in this case. The Court of Appeals found no evidence demonstrating that Congress intended to incorporate the limitations of Section 601 of Title VI into the Rehabilitation Act. The Court concluded that Respondent need only show that the employer received federal financial assistance and that he/she was an intended beneficiary of the assistance, in order to have standing. The Court also concluded that the DOT regulations were written in a manner consistent with the Rehabilitation Act and were therefore valid. The Court of Appeals directly speaks to and each major case relied on by Petitioner.

For these reasons and the reasons cited herein, it is requested that the decision of the Eleventh Circuit be upheld, and this Writ of Certiorari be denied.

Respectfully submitted:

WILLIAM E. JONES

ALEXANDER J. REPASKY
Counsel of Record

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7746

WILLIAM E. JONES,
Plaintiff-Appellant

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Submitted August 6, 1982

Before: VANCE, JOHNSON AND HENDERSON, Circuit Judges

Plaintiff William E. Jones filed suit alleging that Defendant Metropolitan Atlanta Rapid Transit Authority (MARTA) violated Section 504 of the Rehabilitation Act. 29 U.S.C.A. §794, and various federal regulations by denying him a position as bus driver because of his handicap. The district court, 522 F. Supp. 370, determined that plaintiff lacked standing and dismissed the suit. Plaintiff appeals. We reverse.

I. *Facts*

MARTA provides rapid transit for the metropolitan area of Atlanta. The transit authority receives federal financial assistance in the form of engineering and construction grants and operating subsidies from the United States Department of Transportation (DOT). MARTA apparently utilizes a portion of the DOT funds to subsidize wages of certain employment positions, including traffic checkers and bus drivers.

Plaintiff worked for MARTA as a bus driver for 15 years. In March 1976 plaintiff suffered an injury that necessitated the amputation of his right leg. Plaintiff recovered from the injury and

was rehired by MARTA as a traffic checker. Plaintiff; however, became dissatisfied with his position and sought reinstatement as a bus driver. Plaintiff asserted that despite his injury he was capable of performing the required functions of a bus driver. MARTA officials concluded that plaintiff's injury prevented him from performing the duties of a bus driver and denied his request for reinstatement.

After exhausting administrative remedies, plaintiff brought an action under Section 504 of the Rehabilitation Act, 29 U.S.C.A. §794, contending that MARTA discriminated against him on the basis of his handicap. (1)

The district court dismissed his suit. The Court determined that Section 504 only provided a cause of action against employers that received federal financial assistance for the primary purpose of providing employment. Although MARTA received federal financial assistance, the funding was not primarily intended to provide employment.

The district court did note that Plaintiff had standing under regulations promulgated by the DOT. 49 C.F.R. §27.31. The regulations prohibited discrimination against qualified handicapped people in programs or activities that received federal financial assistance of any kind, not just those receiving funds for purposes of providing employment. The district court determined; however, that the regulations exceeded the scope of Section 504 of the Rehabilitation Act and were therefore invalid. Accordingly, MARTA was not amenable to suit under either the Rehabilitation Act or the DOT regulations.

II. STATUTORY FRAMEWORK

Section 504 of the Rehabilitation Act prohibits discrimination against otherwise handicapped individuals in "any program or activity receiving Federal financial assistance..." 29 U.S.C.A. §794. (2)

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1 Plaintiff has an implied right of action under Section 504 of the Rehabilitation Act. *Prewitt v. United States Postal Service*, 622 F. 2d 292, 302 (5th Cir. 1981). *Accord, Miener v. State of MO.* 673 F. 2d 969, 973 (8th Cir. 1982).

the Rehabilitation Act does not; however, specify the remedies, procedures and rights of an aggrieved party. Instead, Section 505 provides that the "remedies, procedures, and rights" of a handicapped individual injured under the Act are found in Title VI of the Civil Rights Act of 1964. 29 U.S.C.A. §794a. (3)

Section 601 of the Civil Rights Act of 1964 (Title VI) contains sweeping prohibitions against race discrimination by employers. (4) Congress; however, place significant restrictions upon the breadth of Section 601. Section 604 authorizes a federal department or agency to maintain an action against employers to enforce Title VI *only* if the employer receives federal financial assistance and "a primary purpose of the Federal financial assistance is to provide employment." 42 U.S.C.A. §2000-3. (5) Thus in order to bring suit under Title VI, an employer must receive federal funds for purposes of providing employment.

A number of circuits have concluded that Congress intended to incorporate the restrictions found in Section 604 of Title VI into the Rehabilitation Act. *United States v. Cabrini Medical Center*, 639 F. 2d 903 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F. 2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 892, 101 S. Ct. 249, 66 L. Ed. 2d 117 (1981); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F. 2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947, 99 S. Ct. 2895, 61 L. Ed. 2d 318 (1979). Thus, a plaintiff will not have standing to maintain a suit under Section 504 of the Rehabilitation Act unless the employer receives

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2 Section 504, 29 U.S.C.A. §794 provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

federal financial assistance and the primary purpose of the assistance is to provide employment. The Courts have employed a variety of rational to justify the incorporation of Section 604 into the Rehabilitation Act. In *Carmi, supra,* the Eighth Circuit essentially concluded that Congress intended the Rehabilitation Act and Title VI to be read *in pari materia*. The Fourth Circuit in *Tragesser, supra*, determined that Congress intended to incorporate Section 604 into the Rehabilitation Act when it amended the Act by adding Section 505. In the absence of controlling precedent in this Circuit (6) and in order to ascertain the correctness of these holdings, we must examine both the language of the relevant statutes and their legislative history.

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3 Section 505, 29 U.S.C.A. §794a provides:

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

4. Section 601 of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d, provides:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

5. Section 604 of the Civil Rights Act of 1964, 42 U.S.C.A. §2000d-3 provides:

Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organizations except where a *primary objective of the Federal financial assistance is to provide employment*.

III. SECTION 504 OF THE REHABILITATION ACT

The starting point for the interpretation of a statute is the language of the act itself. *Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 314, 62 L. Ed. 2d 199 (1979); *United States v. Anderez*, 661 F. 2d 404, 406 (5th Cir. 1981). Normally, a court will interpret a statute in a manner consistent with the plain meaning of the statutory language. *Fitzpatrick v. Internal Revenue Service*, 665 F. 2d 327, 329 (11th Cir. 1982). Where; however, the language of a statute is ambiguous or leads to absurd results, a court is free to consult the legislative history and discern the true intent of Congress. *American Trucking Assn., Inc. v. I.C.C.*, 659 F. 2d 452, 459 (5th Cir. 1981); *Glenn v. United States*, 571 F. 2d 270, 271 (5th Cir. 1978).

Section 504 of the Rehabilitation Act specifically prohibits discrimination against qualified handicapped people in "any program or activity receiving Federal assistance...29 U.S.C.A. §794. On its fact therefore, the Section applies to programs receiving federal financial aid of any kind. Moreover, nothing in the language of the statute indicates that it was intended to reach only those programs receiving federal financial assistance for the primary purpose of providing employment. (7) Because the statute is unambiguous and does not lead to absurd results, we would normally pretermit our analysis here. Nonetheless, for purposes of clarification and in light of authority to the contrary, *United*

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6. Standing under Section 504 of the Rehabilitation Act was considered by the Court in *Brown v. Sibley*, 650 F. 2d 760 (5th Cir. 1981). In Sibley, the Court determined that a plaintiff did not necessarily have standing simply because the employer received some financial assistance from the federal government. Instead, the plaintiff had to establish that "the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." *Id.* at 769. The opinion further stressed that the burden of establishing that the particular program/activity received federal financial assistance "should be slight." *Id.* at 769 n. 14. *Accord, Doyle v. Univ. of Ala.-Birm.*, 680 F. 2d 1323 (11th Cir. 1982); *Simpson v. Reynolds Metals Co., Inc.*, 629 F. 2d 1226, 1232 (7th Cir. 1980).

Although holding that the Plaintiff had to be involved in a program or activity that directly benefited from federal financial assistance, the Court did not determine whether the financial assistance had to be for the purpose of providing employment. Such a determination was unnecessary to the opinion.

States v. Cabrini Medical Center, supra; Carmi v. Metropolitan St. Louis Sewer District, supra we turn to the legislative history to determine whether Congress intended to restrict application of the Rehabilitation Act to those programs receiving federal financial assistance for the primary purpose of employment. *See Wall v. Alaska*, 451 U.S. 259, 266, 101 S. Ct. 1673, 1677, 68 L. Ed. 2d 80 (1981).

Congress enacted the Rehabilitation Act in 1973. Pub. L.No. 93-112, 87 Stat. 355 (1973). Neither the House nor the Senate reports contained even a scintilla of evidence indicating that Congress intended to incorporate Section 604 of Title VI into the Rehabilitation Act and limit the applicability of section 504 to programs receiving federal financial assistance for the primary purpose of providing employment. The legislative history to Section 504 does not even mention Title VI of the Civil Rights Act. Instead, the reports merely reiterate that Section 504 applies to any program receiving federal financial assistance. (8)

The Rehabilitation Act was amended in 1974. Pub.L.No. 93-516, 88 Stat. 1619 (1974). Congress noted obliquely in the legislative history to the amendments that Section 504 was "patterned" after

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7. Similarly, a plain reading of Section 604 of the Civil Rights Act of 1964 would appear to render it inapplicable to private suits under the Rehabilitation Act. Section 604 expressly applies only to federal agencies and departments. Thus a federal agency or department must establish that the employer received federal financial assistance for the purpose of employment in order to maintain an action under Title VI. Section 604 does not, on its fact, apply to private individuals. Accordingly, even were Section 604 deemed applicable to suits under the Rehabilitation Act, it would seemingly apply only to suits brought by federal agencies or departments and not suits brought by private individuals. *Carmi v. Metropolitan St. Louis Sewer District, supra*, 620 F. 2d at 678 (McMillan, J., concurring); *Hart v. County of Alameda*, 485 F. Supp. 66, 72 (N.D.Cal. 1979).

8. For example, the House Report explained the significance of Section 504 stating that:

> Section [504] provides that no otherwise qualified handicapped individual will be discriminated against or excluded from participation in or benefits from any program or activity receiving Federal assistance.

H.R.No. 244, 93rd Cong., 1st Sess. 35 (1973), U.S. Code Cong. & Ad. News, 1973, p. 2076. The Senate Report contained substantially identical language. S.Rep.No. 318, 93rd Cong., 1st Sess. 50, 70 (1973), U.S. Code Cong. & Ad. News 1973, 2076, 2143.

Section 601 of Title VI. S.Rep.No. 1297, 93rd Cong., 2d Sess. (1974), *reprinted in* U.S. Code Cong. & Ad.News 6373, 6390. At least one circuit has relied upon this lone reference as indicia that Congress intended to incorporate wholesale the provisions of Title VI, including Section 604, into the Rehabilitation Act. *Carmi v. Metropolitat St. Louis Sewer District, supra*, 620 F. 2d 674. We find such an interpretation reads far too much into an isolated reference in the legislative history.

The reference does not indicate an intent to incorporate the structures of Title VI into the Rehabilitation Act. Viewed in context, the reference constitutes nothing more than acknowledgement that Section 504 was written with the same sweeping language found in section 601 of Title VI. In fact, the legislative history to the 1974 amendments is replete with notation indicating that Section 504 was intended to encompass programs receiving federal financial assistance of any kind, not just those programs receiving federal financial assistance for the purpose of providing employment. (9)

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9. The Senate Report made clear the broad reach of Section 504. "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefits from, vocational rehabilitation services, *in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided program*." (Emphasis added.) S.Rep.No. 1297, 93rd Cong., 2d Sess. 38 (1974), *reprinted in* U.S. Code Cong. & Ad. News 6373, 6388. Similarly, the Report noted that:

> The language of Section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of *recipients of Federal financial assistance*, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap. Such sanctions would include, where appropriate, the termination of *Federal financial assistance* to the recipient or other means otherwise authorized by law. Implementation of section 504 would also include pre-grant analysis of recipients to ensure that *Federal funds* are not initially provided to those who discriminate against handicapped individuals. (Emphasis added.)

S.Rep.No. 1297, *supra*, at 40, *reprinted in* U.S. Code Cong. & Ad.News *supra*, at 6390.

Furthermore, had congress intended to incorporate wholesale the provisions of Title VI into the Rehabilitation Act, the legislative body would have had no reason to amend the Act in 1978 and provide that the "remedies, procedures, and rights" found in Title VI were applicable to suits under Section 504 of the Rehabilitation Act. (10)

Finally, we note that the Rehabilitation Act is remedial in nature. *Carmi v. Metropolitan St. Louis Sewer District, supra*, 620 F. 2d at 677 (McMillian, J., concurring). As a general matter, courts eschew narrow interpretations of remedial statutes, Instead, remedial statutes are normally accorded broad construction in order to effectuate their purpose. *Peyton v. Rowe*, 391 U.S. 54, 65, 88 S.Ct. 1549, 1555, 20 L.Ed. 2d 426 (1968; *Ayers v. Wolfinbarger*, 491 F.2d 8, 16 (5th Cir. 1974). Because the legislative history is devoid of language demonstrating that Congress intended Section 604 of Title VI to apply to suits under the Rehabilitation Act., the remedial nature of the Rehabilitation Act mandates that we reject such an interpretation.

IV. SECTION 505 OF THE REHABILITATION ACT

In 1978, Congress again amended the Rehabilitation Act and added Section 595. Pub.L.No. 95-602.92 Stat. 2955 (1978). (11) The section provides that the "remedies, procedures, and rights" of an aggrieved party are found in Title VI of the Civil Rights Act of 1964. Significantly, Congress did not simply state that suits under Section 504 of the Rehabilitation Act were controlled by Title VI. Instead, Congress made clear that only the "remedies, procedures, and rights" of Title VI were incorporated into the

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10. In any event, the precise import of the statement in the legislative history that Section 504 was "patterned" after Section 601 of the Civil Rights Act of 1964 is at best unclear. Ambiguous and unclear legislative history may not be used to alter the ordinary meaning of statutory language. *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3.,, 101 S.Ct. 2239, 2241 n.3, 68 L.ed. @d 744 (1981); *Dent v. St. Louis-San Francisco Ry. Co.*, 406 F. 2d 399, 403 (5th Cir. 1969), cert. denied, 403 U.S. 912, 91 S. Ct. 2219, 29 L.Ed. 2d 689 (1971; *League to Save Lake Tahoe, Inc. v. Trounday*, 593 F.2d 1164, 1172 (oth Cir.), *cert. denied*, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed. 2d 310 (1979).

11. The language of Section 505 did not appear in the original House bill. The origin of the language was in the Senate and was added to the final bill at the joint conference. H.Con.R.No. 1780, 95th Cong., 2d Sess. (1978), *reprinted in* U.S. Code. & Ad.News at 7404.

Rehabilitation Act. Section 604, as a substantive restriction on standing, does not constitute a right, remedy or procedure. (12) Thus, under the plain meaning of the language in Section 505, Section 604 of the Civil Rights Act was not incorporated into the Rehabilitation Act.

Any lingering doubt concerning the correct interpretation of Section 505 is dispelled by reference to the legislative history. The legislative history makes clear that Congress intended the amendments to *expand* the remedies of handicapped individuals. *See, e.g.*, 124 Cong.Rec. S-30311 (daily ed., Sept. 20, 1978) (statement by Senator Stafford) ("The bill allows the rehabilitation program to grow and *serve more handicapped individuals* and *provide these individuals with greater opportunities to maximize their potential*.") (emphasis added); *Id.* at S-30303 (statements by Senator Randolph); *Id.* 15 H-13901 (daily ed., May 16, 1978) (statements by Congressman Jeffords). We find it disingenuous to suggest that we read into an amendment intended to broaden remedies under the Act a restriction on standing. (13)

More specifically, the Conference Report to the 1978 Amendments acknowledges that the Rehabilitation Act extends to *any* recipient of federal financial assistance. H.Con.R. No. 1780, 95th Cong., 2d Sess. (1978), *reprinted in* U.S. Code Cong. & Ad.News 7375, 7404 (Section 505 insures that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 would be available to any person aggrieved by any act or failure to act by *any recipient of Federal assistance*..."). Further-

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12. A "remedy" is the means employed to enforce a right or redress an injury. Black's Law Dictionary 1163 (rev. 5th ed. 1979). The term "rights" generally connotes "a power, privilege, faculty, or demand, inherent in one person and incident upon another." Black's Law Dictionary, *supra*, at 1189. Clearly, the restrictions found in Section 604 of the Civil Rights Act of 1964 constitute neither a right nor a remedy under the aforementioned definitions.

Procedures prescribe methods of "enforcing rights or obtaining redress for their invasion; machinery for carrying on procedural aspects of a civil or criminat action . . . As a general rule, laws which fix duties, establish rights and responsibilities among and for persons . . . are 'substantive laws' . . ." Black's Law Dictionary, *supra*, at 1083. By severely restricting the category of people that can maintain an action under the Rehabilitation Act, Section 604 of the Civil Rights Act of 1964 can only be viewed as a substantive limitation on the rights created by Section 504 of the Rehabilitation Act. As such, the restriction cannot be viewed as procedural.

more, the discussion of Section 505 in the Conference Report was located in a subsection titled "Attorneys' Fees and Remedies." The title of any act or subsection can be used to help interpret an ambiguous statute. *Russ v. Wilkins*, 624 F2d 914, 922 (9th Cir. 1980). It is reasonable to conclude that the titled of this subsection indicates that Congress was adopting the section to provide benefits and remedies for an aggrieved party. On the other hand the restrictions found in Section 604 cannot be construed as either a benefit or a remedy. The explanation of the statute and the titled of the subsection therefore establish that Congress did not intend to incorporate Section 604 of the Civil Rights Act into Section 504 of the Rehabilitation Act.

Finally, we note that four years after the adoption of the Rehabilitation Act in 1973, the Department of Health, Education and Welfare enacted regulation that attempted to implement the Act. *See* 45 C.F.R. Part 84. The regulations did not restrict the applicability of the Rehabilitation Act to those programs receiving federal funds for the purpose of providing employment. Instead, the regulations prohibited discrimination against qualified handicapped individuals in programs and activities receiving or benefiting from *any* federal financial assistance. 45 C.F.R. §84.2(f) & (h); §84.4.

In enacting Section 505, the Senate report specifically noted the existence of the HEW regulations. Moreover, the report noted that Section 505 did nothing more than codify the rights, remedies

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13. Other evidence demonstrates that the 1978 amendments were intended to *expand* rather than contract the applicability of the Rehabilitation Act. As originally enacted, Section 504 did not make clear that it applied to the federal government as well as state and local governments. In fact, the Justice Department issued an opinion at the request of the Department of Health, Education and Welfare concluding that the Federal Government was exempt from the statute. The 1978 amendments specifically negated the Justice Department's interpretation by extending the Act to executive agencies and the United States Postal Service. *Prewitt v. United States Postal Service, supra*, 662 F. 2d at 302. As noted by Congressman Jeffords, "[t]his amendment removes [the exemption for the federal government] and applies 504 to the Federal Government as well as State and local recipients of Federal dollars . . . I think this is fair and appropriate and should go a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong.Rec. H-13901 (daily ed., May 16, 1978).

and procedures found in the HEW regulations. S.Rep.No. 890, 95th Cong., 2d Sess. 19 (1978),

> *It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, [Section 505] codifies existing practice as a specific statutory requirement.*

U.S.Code Cong. & Ad.News, 1978 p. 7312. Thus Section 505 was intended to encompass only those remedies, procedures and rights of Title VI found in the HEW regulations. Since the HEW regulations did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporate such a restriction into the Rehabilitation Act. (14)

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14. In *Trageser v. Libbie Rehab. Cntr., Inc., supra*, 590 F. 2d 87, the Fourth Circuit relied upon the language of Section 505 to conclude that Congress intended to incorporate the restrictions of Section 604 into the Rehabilitation Act. We note; however, that the opinion suffers from a number of deficiencies that render its analysis suspect. The *Trageser* court made no attempt to determine whether the restrictions found in Section 604 constituted a right, remedy, or procedure within the meaning of Section 505. Moreover, the opinion failed to examine the legislative history of Section 505. As a result, the opinion did not provide any support from the legislative history for its interpretation. In fact, as we have shown, the legislative history indicates that contrary intent. Finally, without providing any supporting authority, the *Trageser* court concluded that Section 604 was intended to apply to actions be private parties. As noted, however, Section 604 states on its face that it applies only to actions brought by federal departments and agencies. *See* not 7, *supra*. Accordingly, we find the reasoning of the opinion decidedly unpersuasive and decline to follow it.

V. CONCLUSION

Upon consideration of the issue, we have uncovered no evidence demonstrating that Congress intended to incorporate the limitations of Section 601 of Title VI into the Rehabilitation Act. We therefore effectuate the plain meaning of the language in Sections 504 and 505 and conclude that a plaintiff need not establish that the employer received federal financial assistance for the primary purpose of providing employment in order to have standing. Instead, a plaintiff need only show that the employer received federal financial assistance and that he/she was an intended beneficiary of the assistance. *Doyle v. Univ. of Ala.-Birm., supra; Brown v. Sibley, supra.* Moreover, our determination leads to the ineluctable conclusion that the DOT regulations were written in a manner consistent with the Rehabilitation Act and were therefore valid. (15)

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15. The DOT regulations prohibit discrimination against qualified handicapped individuals in any program or activity receiving or benefiting from federal financial assistance. 49 C.F.R. §27.7. The regulations define federal financial assistance as:

> . . . any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise make available assistance in the form of:
>
> (a) Funds;
>
> (b) Services of Federal personnel; or
>
> (c) Real or personal property or any interest in, or use of such property including:
>
> (1) Transfers or leases of such property for less than fair market value or for reduced consideration; and
>
> (2) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

49 C.F.R. §27.5. Thus, the regulations are not limited to employers receiving federal aid for purposes of employment. Instead, they extend to employers receiving or benefiting from any kind of federal financial assistance.

Other federal agencies have adopted similar or identical regulations. *See* 45 C.F.R. Part 85 (Department of Health & Human Services); 13 C.F.R. Part 113 (Small Part 51) (Department of the Treasury).

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7746

WILLIAM E. JONES,

Plaintiff-Appellant,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 6, 1982, 11 Cir., 1982, _____ F.2d _____).

Before VANCE, JOHNSON and HENDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

FILED: October 13, 1982

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. C80-2005A

WILLIAM E. JONES,

Plaintiff-Appellant,

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before VANCE, JOHNSON and HENDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONDSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 6, 1982

ISSUED AS MANDATE: Nov. 5, 1982.

WILLIAM E. JONES, Plaintiff

v.

METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY, Defendant

Civ. A. No. C80-2005

United States District Court

N.D. Georgia,

Atlanta Division

August 27, 1982

Alexander J. Repasky, Atlanta, Georgia for Plaintiff

Paul A. Howell, Jr., Denise Caffrey, Francial Toole-MARTA, Atlanta, Georgia for Defendant.

ORDER

MOYE, Chief Judge.

Plaintiff William E. Jones brought this suit against the Metropolitan Atlanta Rapid Transit Authority (MARTA) pursuant to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The plaintiff alleges that MARTA is a recipient of federal financial assistance as contemplated by section 504 and has discriminated against him, an otherwise qualified handicapped individual as defined by 29 U.S.C. §706(7), solely by reason of his handicap. As a result, plaintiff seeks actual and punitive damages, recovery for mental anguish, pain and suffering, and reinstatement to his former position as a bus driver.

Defendent MARTA has moved for summary judgment or, althernatively, partial summary judgment. Defendant's motion for summary judgement rests on the argument that plaintiff lacks standing to sue under section 504; its argument for partial summary judgement seeks a ruling that recovery may not be had for general or punitive damages under Section 504 as a matter of law or that recovery for those types of damages is barred by the applicable statute of limitations. The Court first considers the theshold issue of standing.

Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, on which plaintiff relies for recovery provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this titled, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation

rested with the Secretary of Health and Human Services. Exec. Order No. 11,914 §5, 45 C.F.R. Part 85, app. A (1979), *reprinted in* 29 U.S.C. §794 note (1976). Both executive orders, however, provided for the issurance by the various federal departments and agencies of appropriate guidelines or regulations to insure the property application of section 504 to recipients of federal financial assistance as long as those regulations were consistent with the requirements of the Secretary of Health and Human Services, and later, the Attorney General. *See* Exec. Order No. 11,914, §2; Exec. Order No. 12,250 §1-402.

The specific provisions of the Rehabilitation Act recited above are in part the result of the 1978 Amendments to the Rehabilitation Act. The 1978 Amendments made available to those aggrieved under section 504 the remedies, rights, and procedures available under Title VI of the Civil Rights Act of 1964 and provided attorneys' fees to prevailing private litigants. *See* 29 U.S.C. §794a(a)(2) and (b). The 1978 Amendments also limited the reach of section 504 by the express refusal of section 604 of Title VI of the Civil Rights Act of 1964 to authorize government enforcement actions against a recipient of federal aid unless a primary objective of the federal financial assistance is to provide employment. *See* 29 U.S.C. §794(a)(2) (reprinted *supra*) and 42 U.S.C. §2000d-3 (reprinted *supra*) and 42 U.S.C. §2000d-3 (reprinted *supra*). While Congress in 1978 burdended section 504 of the Rehabilitation Act with the limitations of Section 604 of the Civil Rights Act, it chose not to so burden section 501 of the Rehabilitation Act. The 1978 Amendments made the remedies, procedures and rights set forth in Title VII of the Civil Rights Act of 1974 applicable to section 501 and those remedies, procedures, and rights included no limitations as found in section 604. *See* 29 U.S.C. §794a(a)(1) and 42 U.S.C. §2000e-15.

Having outlined the statutory setting of this suit, the Court now considers defendant MARTA's motion for summary judgment. MARTA contends that since the remedies, procedures, and rights under section 504 are those remedies, procedures and rights available under Title VI of the Civil Rights Act, it follows that a complainant alleging handicapped discrimination in employment pursuant to section 504 must show that the purpose of the federal financial assistance received by the employee is to provide employment, as required by section 604 of the Civil Rights

> shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date of which such regulation is to be submitted to such committees.

Section 504(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794(a)(2), provides:

> The remedies, procedures, and rights set forth in titled VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

Therefore, one must look to Title VI of the Civil Rights Act of 1964 to determine the remedies, procedures, and rights of the plaintiff.

Title VI, Section 601, 42 U.S.C. §2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI, Section 604, 42 U.S.C. §2000d-3, provides:

> Nothing in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organizations except where a primary objective of the Federal financial assistance is to provide employment.

The Congress, in enacting the Rehabilitation Act of 1973, generally patterned the legislation after the Civil Rights Act of 1964. Specifically, Congress patterned section 504 after Title VI of the Civil Rights Act and section 901 of the Education Amendments Act of 1972. *See* S.Rep.No. 93-1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S.Code Cong. & Ad.News 6373, 6390. Since November 2, 1980, the Attorney General has coordinated the administration and enforcement of section 504 at the direction of the President since the Rehabilitation Act does not provide for the enforcement of its provisions. Exec. Order No. 12,250, 45 Fed.Reg. 72,995 (1980), *reprinted in* 42 U.S.C. §2000d-1 note, at 199 (Supp.1980). Prior to the issurance of that executive order the responsibility for administering and enforcing section 504 had

Act, as explained above. As MARTA notes, the three United States Courts of Appeal which have considered this question have all so held. *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), *cert denied*, 49 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1979), *cert. denied*, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed. 2d 318 (1979). The Court in *Simpson*held that to maintain an action for employment discrimination under Section 504, a handicapped individual must be an intended beneficiary of the federal financial assistance received by his employer or must be able to show that the discrimination directed against him affected the beneficiaries of such aid. 629 F.2d at 1227. MARTA, in addition, refers the Court to *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), wherein the Fifth Circuit held that section 604 of the Civil Rights Act of 1964 limits the applicability of Title VI to discrimination against the beneficiaries of the federally assisted programs and does not apply to discrimination against employees of federally assisted programs unless the employees are the intended beneficiaries of the program. *Id.* at 882-83.

MARTA argues, therefore, that the plaintiff herein must show that the purpose of the federal financial assistance to MARTA is to provide employment or that the alleged discrimination directed against him affects the beneficiaries of such aid. MARTA has supplemented the record with the affidavits of Alan F. Keipper, MARTA General Manager, and Carroll O. Olson, MARTA Urban Mass Transportation Administration (UMTA) Coordinator, who have stated that MARTA is the recipient of federal financial assistance in the form of engineering and construction grants and operating subsidiaries received from the United States Department of Transportation as administered by UMTA. Olson's affidavit has attached to it all of the grant contracts received by MARTA from UMTA for operating assistance from July 1, 1976, through June 30, 1981. MARTA's argument is, of course, that these affidavits and copies of grants, along with the findings and purposes of the Urban Mass Transportation Act, 49 U.S.C. §1601 *et seq.*, which it recites, indicate clearly that plaintiff Jones may not recover under section 504 of the Rehabilitation Act since the

federal financial assistance MARTA receives does not have as a primary objective the provision of employment.

In response to MARTA's defense based on lack of standing to sue the plaintiff has made few arguments. Plaintiff first relies upon *Poole v. South Plainfield Board of Education*, 490 F.Supp. 948 (D.N.J. 1980), which held that section 504 is applicable to the interscholastic athletic activities of a school system receiving federal funding even if none of the federal funds are specifically spent on interscholastic athletics. *Id.* at 951. While the Court may have broadly defined "program or activity" as found in Section 601 of the Civil Rights Act of 1964, it did nothing to eliminate Section 604's limitation of section 504 to programs or activities receiving Federal financial assistance where a primary objective of the federal financial assistance is to provide employment.

With respect to defendant's reliance on *Simpson, Carmi,* and *Trageser*, the plaintiff states his belief that they incorrectly applied section 604 of the Civil Rights Act to Section 504 of the Rehabilitation Act since section 604, as written, is a prohibition against suits by departments or agencies of the government. Each case, however, explained in varying degrees of detail why it was holding that although section 604 expressly curtails the authority of federal departments and agencies it also restricts private suits. *See Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 89 (4th Cir. 1978) (holding section 604 applicable to private suits without explanation); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-75 (8th Cir. 1980) (holding section 604 applicable to private suits based on the legislative history of Title VI); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226, 1237 (7th Cir. 1980) (holding that Congress did not intend to extend protection under Title VI to any *person* other than an intended beneficiary of federal financial assistance based on the legislative history of Title VI). The Fifth Circuit case discussed above, *United States v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) inferred its agreement with the above holdings when it stated that section 604 clearly excluded the application to Title VI to a farmer receiving benefits under the Agricultural Adjustment Act. 372 F.2d at 883. If the limitations of section 604 apply to a farmer despite the sections' reference to agencies and department, they also apply to plaintiff. The Court therefore finds section 604 applicable to plaintiff Jones.

In response to the materials in the record indicating the purposes of the Urban Mass Transportation Act, 49 U.S.C. §1601 *et seq.*, which are applicable due to the above finding, plaintiff argues that the rules and regulations promulgated under the Act make clear that funds disbursed thereunder are for the purpose of employment of labor. In addition, plaintiff argues that the plaintiff is an intended beneficiary under the Urban Mass Transportation Act since his affidavit shows the position he now holds (checker) and the one he seeks (driver) are partially funded by federal grants for engineering, construction, and operations. The Court is unpersuaded that MARTA's use of federal funds for operations, engineering, or construction alters Congress' states purposes for the appropriation of public funds. The Court will not base its conclusion as to the primary purposes of Congress' appropriations of federal funds for MARTA on MARTA's use of the funds when the Congress itself has explained its purposes.

Finally, the Court considers plaintiff's reference in his supplemental brief to an Order of the Secretary of Transportation issued January 19, 1977, a certified copy of which was attached to plaintiff's brief. The order was Department of Transportation's implementation of Title VI, the Department's regulations, and the Department of Justice's regulations issued pursuant to Exec. Order No. 111,764, 39 Fed.Reg. 2,575. However, Exec. Order No. 12,250, 45 Fed.Reg. 72,995 (1980), and 49 C.F.R. Part 27, based upon 44 Fed.Reg. 31,468 (1979), now apparently provides the Department of Transportation's regulations with respect to section 504 of the Rehabilitation Act. Pursuant to Section 1-504 of Exec. Order No. 12,250, which allowed existing agency regulations to continue to effect upon the issuance of said executive order, 49 C.F.R. Part 27 appears to remain as the Department of Transportation's guidelines with respect to the matters discussed therein, namely discrimination on the basis of handicap in programs and activities receiving or benefiting from federal financial assistance.

The Court is puzzled by plaintiff's failure to rely upon 49 C.F.R. §§ 27.31 to 27.37 which, in section 27.31(a)(1), broadly states that no qualified handicapped applicant for employment, or an employee shall, on the basis of handicap, be subjected to discrimination in employment under *any program or activity that receives or benefits from federal financial assistance.* That regula-

tion, if applicable, would provide plaintiff with the standing he seeks under the facts alleged in his complaint. The Court, however, believes that 49 C.F.R. §27.31(a)(1)'s failure to include within its proscription the limitation of section 604 of the Civil Rights Act of 1964 means the Secretary of Transportation, who relied upon section 504 of the Rehabilitation Act, section 16(a) of the Urban Mass Transportation Act, 49 U.S.C. §1612(a), and section 165(b) of the Federal Aid Highway Act of 1973, as amended, 23 U.S.C. §143 note, as his authority for the promulgation of this regulation, exceeded his statutory authority in applying section 504 to *any* program or activity that receives or benefits from federal financial assistance.

The Court's attempt to locate other cases brought pursuant to section 504 of the Rehabilitation Act against a recipient of funds from the Department of Transportation in order to determine how other courts have reconciled 49 C.F.R. §27.31 with the applicable provisions of the Rehabilitation Act and Title VI met with little success. The only case the Court could locate, *Lestrange v. Consolidated Rail Corp.*, 501 F.Supp. 964 (M.D.Pa. 1980), involved a suit by an amputee against a railroad which had received federal financial assistance from the Department of Transportation in the form of loans under the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-79. The Court concluded, as did *Trageser* and *Carmi*, discussed above, that the restriction of section 604 of Title VI is applicable to a case brought pursuant to section 504 of the Rehabilitation Act, requiring a finding as to the primary objectives of the Rail Act. 501 F.Supp. at 96869. The court never considered 49 C.F.R. or the failure of 49 C.F.R. §27.31 to limit its applicability to recipients of federal funds to those whose primary objective was to provide employment. This Court, apparently in a case of first impression, finds 49 C.F.R. Part 27, Subpart B (Employment Practices), to have exceeded the statutory authority vested in the Secretary of Transportation inasmuch as it is inconsistent with the Rehabilitation Act's deference to Title VI of the Civil Rights Act for its applicable remedies, procedures, and rights.

The sole question remaining for discussion with respect to defendant's motion as it relates to standing is whether providing employment is in any conceivable way a primary purpose of the legislation under which MARTA has received its funds. MARTA's

grants are products of the Urban Mass Transportation Act, 49 U.S.C. §1601 *et seq.* The findings and purposes of the Act and the assistance granted pursuant thereto are included in §§1601, 1601a and 1601b, which read as follows:

§1601. *Declaration of Findings and Purposes*

(a) The congress finds —

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the welfare and vitality of urban areas, the satisfactory movement of people and goods within such areas, and the effectiveness of housing, urban renewal, highway, and other federally aided programs are being jeopardized by the deterioration or inadequate provision of urban transportation facilities and services, the intensification of traffic congestion, and the lack of coordinated transportation and other development planning on a comprehensive and continuing basis; and

(3) that Federal financial assistance for the development of efficient and coordinated mass transporation systems is essential to the solution of these urban problems.

(b) The purposes of this chapter are—

(1) to assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private;

(2) to encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development, with the cooperation of mass transportation companies both public and private; and

(3) to provide assistance to State and local governments and their instrumentalities in financing such systems, to be operated by public or private mass transportation companies as determined by local needs.

§1601a. *Additional Declaration of Findings and Purpose*

The Congress finds that the rapid urbanization and the continued dispersal of population and activities within urban areas has made the ability of all citizens to move quickly and at a reasonable cost an urgent national problem; that it is imperative, if efficient, safe, and convenient transportation compatible with soundly planned urban areas is to be achieved, to continue and expand this chapter; and that success will require a Federal commitment for the expenditure of at least $10,000,000,000 over a twelve-year period to permit confident and continuing local planning, and greater flexibility in program administration. It is the purpose of this Act to create a partnership which permits the local community, through Federal financial assistance, to exercise the initiative necessary to satisfy its urban mass transportation requirements.

§1601b. *Additional Declaration of Findings*

The Congress finds that—

(1) over 70 per centum of the Nation's population lives in urban areas;

(2) transportation is the life-blood of an urbanized society and the health and welfare of that society depends upon the provisions of efficient economical and convenient transportation within and between its urban areas;

(3) for many years the mass transportation industry satisfied the transportation needs of the urban areas of the country capably and profitably;

(4) in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service;

(5) the termination of such service or the continued increase in its cost to the user is undesirable, and may have a particularly serious adverse effect upon the welfare of a substantial number of lower income persons;

(6) some urban areas are now engaged in developing preliminary plans for, or are actually carrying out, comprehensive projects to revitalize their mass transportation systems to continue to provide vital service.

These findings and purposes contain no stated or implied purpose to provide employment. While the federal funds MARTA receives may have no incidental effect on employment, the Court is unable to conclude that creating jobs is a primary objective of the Urban Mass Transportation Act, or that the plaintiff herein, a checker seeking to become a driver, is an intended beneficiary of the funds MARTA receives. Consequently, the Court concludes that the limitation of section 604 of the Civil Rights Act of 1964 denies plaintiff Jones of standing to bring suit against MARTA for alleged employment discrimination on the basis of his disability. Defendant's motion for summary judgment is therefore GRANTED, and plaintiff's pending motion for trial by jury is DENIED as moot.

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ALEXANDER J. REPASKY
LARRY PAUL MININ

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MAY 31 1983
OFFICE OF THE CLERK
SUPREME COURT, U. S.

May 27, 1983

Mr. Francis Lorson
Chief Deputy Clerk
Office of the Clerk
Superior Court of the United States
Washington, D.C. 20543

RE: Metropolitan Atlanta Rapid
Transit Authority vs William E. Jones
#82-1159

Dear Mr. Lorson:

This letter is written pursuant to our telephone conversation of May 27 1983. As I had told you in that conversation, I was unaware that the letter from the Clerk's office requesting responsive briefs on the issue of Certiorari in the above captioned case had the effect of an Order. I had understood that responsive briefs to applications for Certiorari were not necessary, and due to the financial condition of my client, I did not want to incure the publication costs twice should the Court decide to address the merits of the case.

After reviewing the case law among the various Circuit Court of Appeals, it would appear that there is a division regarding the appropriate laws to be followed. While we believe that the decision in our case is correct on the merits of the issues, clarification of the law may indeed be necessary.

This office has not handled matters before the Superior Court of the United States on any previous occasions, and attorneys here have this date requested applications to practice before the bar of the Superior Court of the United States.

It is my present understanding that this application must be processed before I will be able to submit either a brief on the merits of this case or any responsive memorandum on the issue of Certiorari.

Mr Larson, I apologize to the Court and am thoroughly embarrassed by our previous understanding of what was necessary in response to the application for Certiorari filed in this case. I would hope that the Court will grant us a short but reasonable time in which to fashion a response at this time and to present briefs on the merits of the case should the Court decide to hear the matter.

Very truly yours,

Alexander J. Repasky

Alexander J. Repasky

AJR:ji
cc: Mr. Paul A. Howell

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

May 3, 1983

Alexander J. Repasky, Esq.
Suite 1300 Rhodes Haverty Building
134 Peachtree Street
Atlanta, Georgia 30303

RE: Metropolitan Atlanta Rapid Transit Authority v. William E. Jones
No. 82-1159

Dear Mr. Repasky:

By letter dated April 5, 1983 you were granted an extension of time to and including April 15, 1983 in which to file a response to the petition for a writ of certiorari that the Court directed the Clerk to call for. As of this writing, no such response has been received.

Kindly advise this office of the status of your response.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

rjb
cc: Paul A. Howell, Jr., Esq.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

April 5, 1983

Alexander J. Repasky, Esq.
Repasky & Minn
Rhodes Haverty Building
Suite 1300
134 Peachtree Street
Altanta, Georgia 30303

RE: Metropolitan Atlanta Rapid Transit Authority v. William E. Jones
No. 82-1159

Dear Mr. Repasky:

Your request of March 30, 1983 for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including April 15, 1983.

No further request for an extension of time will be entertained by the Clerk.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By

Francis J. Lorson
Chief Deputy Clerk

rjb
cc: Paul A. Howell, Jr., Esq.

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SUPREME COURT, U.S.

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ALEXANDER J. REPASKY
LARRY PAUL MININ

(404) 688-9116

March 30, 1983

Mr. Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Metropolitan Atlanta Rapid Transit Authority v. William E. Jones, No. 821159

Dear Mr. Stevas:

We would greatly appreciate a thirty (30) day continuance to file a response in the above-styled case.

Very truly yours,

Alexander J. Repasky
by John McGuigan

AJR:rr

cc: Paul A. Howell, Jr., Esquire
Kutak, Rock & Huie
1200 Standard Federal Savings Bldg.
Atlanta, Georgia 30303

4/5/83 Motion Granted. Time for filing response to petition for writ of certiorari extended to and including 5/15/83.
Warren E. Burger
Chief Justice

No further ext., etc.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

March 2, 1983

Alexander J. Repasky, Esq.
John McGuigan, Esq.
134 Peachtree Street, Suite 1300
Atlanta, Georgia 30303

Re: Metropolitan Atlanta Rapid Transit Authority v. William E. Jones, No. 82-1159

Gentlemen:

On January 11, 1983, a petition for a writ of certiorari in the above case was filed in this Court to review an order of the United States Court of Appeals for the Eleventh Circuit (No. 81-7746), dated August 6, 1982. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Forty printed copies of your response, together with proof of service thereof, should reach this office on or before April 1, 1983.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be light orange.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Alexander L. Stevas
Clerk

cc: Paul A. Howell, Jr., Esq.
Kutak Rock & Huie
1200 Standard Federal Savings Bldg.
Atlanta, Georgia 30303